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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

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LINDA PANICH et al.,

Plaintiffs and Appellants,

v.

BEN'S TRUCK & EQUIPMENT, INC.,

Defendant and Respondent.

C068068

(Super. Ct. No. 169632)

Defendant Ben's Truck & Equipment, Inc. (Ben's) moved to disqualify the law firm of Maire & Burgess from representing plaintiffs (Linda Panich; Henry Edelstein, as trustee of the Henry Edelstein 2002 Trust; and Victoria Pickering Edelstein) in this action because 20 years earlier Wayne Maire was involved in the representation of Ben Sale, the president and sole owner of Ben's, in another matter. Finding that confidential information had been presumptively and actually disclosed to Maire in connection with his firm's prior representation of Sale, the trial court granted the disqualification motion. On plaintiffs' appeal of that order, we find no abuse of discretion and therefore affirm the disqualification.

## FACTUAL AND PROCEDURAL BACKGROUND

### *The Earlier Representation*

Before 1982, one of the ways Sale made money was by providing workers and equipment to the California Department of Forestry and the United States Forest Service (the public agencies) to assist in fighting wild land and forest fires. At some point, Sale was charged in Tehama County with 54 felony counts of conspiracy to commit arson, apparently based on accusations that he had conspired to set some of the fires he made money supplying men and equipment to fight.

The case was originally tried in Modoc County, with attorney Greg Stout defending Sale. The trial ended with a jury hung 11 to 1 for conviction. A retrial took place in Mendocino County, with attorney Joe Gazzigli defending Sale. This time, Sale was acquitted on all counts.

Based on his review of the transcripts from the original trial, Gazzigli concluded Stout had committed malpractice in his defense of Sale, and Gazzigli recommended that Sale refuse to pay Stout the outstanding balance of approximately \$150,000 in attorney fees Stout was claiming Sale owed. Gazzigli also recommended that Sale consider suing Stout for malpractice, to recover the costs of the second trial and damages for the business Sale lost when the public agencies "blacklisted" him as a contractor in 1982 as a result of the near conviction.

When Stout sued Sale for the unpaid fees around 1984, Gazzigli referred Sale to the law firm of Simpson & Maire to represent Sale in defending against the collection action and in

prosecuting a cross-complaint against Stout for legal malpractice. At the time, Simpson & Maire apparently had three attorneys in total. In late 1984 or early 1985, Gazzigli took Sale to meet with both Robert Simpson and Wayne Maire to discuss their firm's potential representation of Sale. In Sale's own words, "[a]t that initial and lengthy meeting, . . . Gazzigli and [Sale] shared considerable confidential information about the nature and outcome of the two criminal cases, . . . [Sale's] alleged criminal activities as charged in those cases, [his] personal financial status and family history, [his] involvement/relationship with the two chief prosecution witnesses against [him], the contractual relationship, billing practices and gross and net income [he] generated from providing men and equipment to [the public agencies], and the nature and scope of [his] business entities and operations."

The firm decided to take Sale's case. Several months after the original meeting, Sale met again with both Simpson and Maire, at which time they recommended that he seek a mutual dismissal of the collection action and the malpractice cross-complaint. Sale did not agree and spoke with Gazzigli about the recommendation. Gazzigli told him a new attorney with experience in legal malpractice cases -- Lew Garbutt -- was joining the firm. Gazzigli arranged a meeting between Sale, Simpson, Maire, and Garbutt. As a result of that meeting, it was agreed Garbutt would undertake the defense of the collection action and the prosecution of the malpractice cross-complaint, with Gazzigli serving as a consultant.

According to Garbutt, he joined the Simpson & Maire firm in or around November 1985, at which time the firm changed its name to Simpson, Maire & Garbutt.<sup>1</sup> Shortly after he joined the firm, Simpson and Maire asked him to review Sale's case to determine whether it was worth pursuing. In the course of reviewing the case, Garbutt had lengthy meetings with Sale and Gazzigli, which involved "disclosure to [Garbutt] of an enormous amount of confidential data regarding the two criminal prosecutions and pertinent confidential information about . . . Sale's personal and business reputation, his business history, practices and philosophy, his educational background and health status, his ability to effectively participate in and understand the process of pursuing this type of action, as well as the willingness of . . . Sale, his wife, employees and others to commit to assist in the development of a case strategy and participate as needed throughout what could be a lengthy and stressful process."

The malpractice action, which was being pursued on a contingency fee basis, continued over three years during which Garbutt was a partner with the Simpson firm. During that time, both Simpson and Maire were kept well informed about the progress of the case. According to Garbutt, "[a]s . . . Sale's counsel, [he] learned what would clearly be deemed confidential information about [Sale] personally, his litigation history and experience, the nature and scope of his business interests,

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<sup>1</sup> Hereafter, we will refer to both Simpson & Maire and Simpson, Maire & Garbutt as the Simpson firm.

operations and practices, persons with whom he associated personally and in business, the nature of his finances and how he managed those finances, his philosophy about business dealings and how he viewed transaction documents or the absence of a need for same because of a handshake deal, his reputation for honesty, integrity and business savvy, his personality traits (strengths and weaknesses), and much, much more." In the course of updating Simpson and Maire on the progress of the case, Garbutt shared much of this confidential information with them.

Also during the progress of the case, Gazzigli shared with the firm "extensive confidential information . . . about the charges against . . . Sale, the two trials, the details of the defense strategy, information about . . . Sale's character, his financial status and ability to pay past and future legal fees, the nature and scope of his business operations and style of business practices, his reputation in the community for integrity and honesty . . . and multiple other specific facts and opinions about why and how to successfully defend the collection action and prosecute the legal malpractice case."

After three years, Garbutt left the Simpson firm, taking Sale with him as a client, but the firm was still involved in Sale's malpractice action because of the firm's investment in the action. Eventually, a court trial began in May 1990, but before the trial concluded the case was settled for the limits of Stout's malpractice insurance. From those proceeds, the

Simpson firm recovered the costs the firm had paid as well as a substantial fee.

*The Current Representation*

Fast forward 20 years. In July 2010, plaintiffs commenced this action by filing a complaint against Ben's for breach of contract and declaratory relief and to quiet title. At the time the complaint was filed, plaintiffs were represented by attorney Robert Harding. The complaint arose out of a development agreement under which Ben's had agreed to construct improvements on land owned by plaintiffs for a 24-lot subdivision known as Whispering Woods, Phase 1. Plaintiffs alleged that Ben's had breached the development agreement by stopping work on the project and demanding that the ceiling price for its services, which was set in the development agreement, be increased. Plaintiffs also alleged that Ben's had breached the development agreement by overcharging for work performed on their property and by demanding payment for services that had, in fact, been performed on adjacent property belonging to Ben's instead of on plaintiffs' property.

(Apparently a second phase of the Whispering Woods project was to be developed simultaneously on this adjacent property.)

In August 2010, Ben's (represented in part by Garbutt) filed a cross-complaint in the action, alleging that plaintiffs had breached the development agreement by preventing the corporation from completing the improvements on their property. Ben's also alleged that plaintiffs owed over \$1 million for services the corporation had already provided.

In mid-October 2010, the law firm of Maire & Burgess substituted into the action as the attorneys for plaintiffs. In light of Maire's prior representation of Sale in the Stout matter, Garbutt immediately requested that Maire & Burgess provide a detailed written disclosure regarding the firm's compliance with rule 3-310 of the Rules of Professional Conduct, which addresses avoiding the representation of adverse interests. In response, Jody Burgess wrote that Maire & Burgess did "not have confidential information material to the case at hand" and that Maire had "no recollection of being directly involved in the prior representation of . . . Sale."

When further correspondence between Garbutt and Maire & Burgess failed to resolve the matter, Ben's filed a motion to disqualify Maire & Burgess from representing plaintiffs. In opposition, plaintiffs argued it would be improper to disqualify Maire & Burgess from representing them because there was no substantial relationship between Maire's earlier representation of Sale in the Stout matter and the current matter. Plaintiffs also offered a declaration from Maire, in which he asserted (among other things) that with regard to the Stout matter "Garbutt did not provide periodic updates about the case progression or otherwise divulge confidential information to [Maire] as the case progressed."

In February 2011, the trial court granted the disqualification motion. Noting that the earlier representation "involved allegations of criminal activity involving . . . Sale's business operations," while the present case involves

allegations relating to "Sale's business operations in performance (or lack thereof) of a contract with Plaintiffs," the court concluded that "Sale's business practices/operations are common subject matter in both courses of representation. As such, a presumption of divulgence of confidential information exists" which "alone supports disqualification." The court also found that "Sale's character, reputation, personal strengths and weaknesses, litigation attitudes, family history, educational background, health status, litigation history or experience, as well as the nature and outcome of his prior criminal cases are necessarily relevant to evaluation and litigation strategy in this litigation."

In addition to the foregoing, the court concluded that Maire's "involvement in the initial meeting with . . . Sale is sufficient to make it likely that he acquired confidential information concerning . . . Sale's business practices which are relevant to the present representation." The court also "resolve[d] in favor of . . . Sale the factual dispute concerning the extent to which . . . Maire was made aware of the status of the prior litigation."

Plaintiffs filed a motion for reconsideration based on master calendars they claimed showed that Maire had not attended the initial meeting with Sale regarding the Stout matter. The court found that plaintiffs had "not provided a satisfactory explanation for why the new evidence . . . could not have been presented at an earlier time." Moreover, the court concluded that even if it were to grant reconsideration, it would reaffirm



its prior ruling because the court "did not grant the [disqualification] motion solely based on . . . whether . . . Sale met with . . . Maire and others for an initial meeting regarding representation." Accordingly, the court denied the motion for reconsideration.

Thereafter, plaintiffs filed a timely notice of appeal from the order granting the disqualification motion. (Cal. Rules of Court, rule 8.108(e).)

## DISCUSSION

### I

#### *Standard Of Review*

"An order granting . . . a disqualification motion . . . is reviewed for abuse of discretion [citation]. The trial court's ruling is presumed correct [citation] and reversal is permissible 'only when there is no reasonable basis for the trial court's decision' [citation]. We accept as correct all of the court's express or implied findings that are supported by substantial evidence. [Citation.]

"'In viewing the evidence, we look only to the evidence supporting the prevailing party. [Citation.] We discard evidence unfavorable to the prevailing party as not having sufficient verity to be accepted by the trier of fact. [Citation.] Where the trial court has drawn reasonable inferences from the evidence, we have no power to draw different inferences, even though different inferences may also be reasonable.'" (Kennedy v. Eldridge (2011) 201 Cal.App.4th 1197, 1203.)

## II

### *Standing*

Plaintiffs' initial challenge to the disqualification order is based on the fact that the client in the former representation was Sale, while the client in the present representation is his corporation, Ben's, which is a separate entity. In plaintiffs' view, because the Simpson firm did not have an attorney-client relationship with Ben's, and because Sale is not a party to this action, Maire & Burgess cannot be disqualified from representing plaintiffs here.

Plaintiffs are mistaken. This court rejected a similar argument recently in *Kennedy*. There, the petitioner in a paternity action (Kayla) moved to disqualify the paternal grandfather of her child from representing his son (Tyler) in the action. (*Kennedy v. Eldridge, supra*, 201 Cal.App.4th at pp. 1201-1202.) On appeal from an order granting that motion, Tyler argued that disqualification was improper because Kayla had never been his father's client, and therefore his father "owed her no duty of confidentiality and therefore had no conflict of interest in representing Tyler." (*Id.* at p. 1203.) This court disagreed, noting that "no California case has held that only a client or former client may bring a disqualification motion." (*Id.* at p. 1204.) The court further explained as follows:

"A trial court's authority to disqualify an attorney derives from the power inherent in every court '[t]o control in furtherance of justice, the conduct of its ministerial officers,

and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto.'

[Citations.]" [Citations.] "[D]isqualification motions involve a conflict between the clients' right to counsel of their choice and the need to maintain ethical standards of professional responsibility. [Citation.] The paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar. The important right to counsel of one's choice must yield to ethical considerations that affect the fundamental principles of our judicial process.'" [Citation.]

"Consequently, while federal courts generally limit standing to bring disqualification motions to clients or former clients [citation], in California 'where the ethical breach is "'manifest and glaring'" and so "infects the litigation in which disqualification is sought that it impacts the moving party's interest in a just and lawful determination of [his or] her claims" [citation], a nonclient might meet the standing requirements to bring a motion to disqualify based upon a third party conflict of interest or other ethical violation.'

[Citation.] Case law abounds with examples of orders disqualifying counsel that have not been the product of motions by present or former clients. [Citations.]

"It makes no sense for a court to stand idly by and permit conflicted counsel to participate in a case merely because neither a client nor former client has brought a motion. As one court put it, 'Protection of the attorney-client privilege is

not the *only* ground for a motion to disqualify an attorney.' [Citation.] '[T]he court has an *independent interest* in ensuring trials are conducted within ethical standards of the profession and that legal proceedings appear fair to all [who] observe them.' [Citation.] Accordingly, we conclude that where an attorney's continued representation threatens an opposing litigant with cognizable injury or would undermine the integrity of the judicial process, the trial court may grant a motion for disqualification, regardless of whether a motion is brought by a present or former client of recused counsel." (*Kennedy v. Eldridge, supra*, 201 Cal.App.4th at pp. 1204-1205.)

The foregoing discussion is dispositive of plaintiffs' initial argument here. It does not matter that the client in the previous representation was Sale, while the client in the present representation is his closely held corporation. What matters is whether the trial court could have reasonably concluded that, as a result of the Simpson firm's prior representation of Sale, Maire obtained confidential information material to this action against Sale's corporation, thus justifying disqualification of Maire's current firm, Maire & Burgess, from representing plaintiffs in this action. We find the court could have come to that conclusion.

### III

#### *Confidentiality, Conflict Of Interest, And Successive Representation*

"To protect the confidentiality of the attorney-client relationship, the State Bar Rules of Professional Conduct, rule

3-310 (rule 3-310) prohibits attorneys from accepting, without the client's informed written consent, 'employment adverse to the client or former client where, by reason of the representation of the client or former client, the [attorney] has obtained confidential information material to the employment.'" (*People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1146.) Under this rule, if by reason of the Simpson firm's prior representation of Sale in the Stout matter Maire obtained confidential information that is material to the current representation of plaintiffs by Maire & Burgess in this action against Sale's corporation, then the trial court properly disqualified Maire & Burgess from representing plaintiffs here due to the conflict of interest.

A

*Receipt Of Confidential Information -- Actual Or Presumptive*

The first step in establishing a conflict of interest under rule 3-310 in a case of successive representation is to show that the attorney received confidential information as a result of the prior representation. This can be done by showing *actual* receipt or *presumptive* receipt. (See *H. F. Ahmanson & Co. v. Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1445, 1452.)

""When a substantial relationship has been shown to exist between the former representation and the current representation, and when it appears by virtue of the nature of the former representation or the relationship of the attorney to his former client confidential information material to the

current dispute would normally have been imparted to the attorney or to subordinates for whose legal work he was responsible, the attorney's knowledge of confidential information is presumed."'" (*Adams v. Aerojet-General Corp.* (2001) 86 Cal.App.4th 1324, 1331.) Thus, "[i]f the former client can establish the existence of a substantial relationship between representations, the courts will conclusively presume the attorney possesses confidential information adverse to the former client." (*H. F. Ahmanson & Co.*, at p. 1452.)

Here, the trial court found *both* actual receipt *and* presumptive receipt of confidential information by Maire. With respect to the issue of presumptive receipt, the trial court found that "a presumption of divulgence of confidential information exist[ed]" which "alone support[ed] disqualification" because "Sale's business practices/operations are common subject matter in both courses of representation."

With respect to the issue of actual receipt, on the other hand, the trial court found that "Sale met with . . . Maire and others for an initial meeting regarding representation" and Maire's "involvement in the initial meeting with . . . Sale is sufficient to make it likely that he acquired confidential information concerning . . . Sale's business practices which are relevant to the present representation." The court also "resolve[d] in favor of . . . Sale the factual dispute concerning the extent to which . . . Maire was made aware of the status of the prior litigation." Thus, at the very least, the trial court accepted the testimony of Garbutt that he shared

with Maire throughout the course of the Stout matter much of the confidential information he learned from Sale about various topics.<sup>2</sup> At the same time, the court necessarily rejected Maire's claim that "Garbutt did not provide periodic updates about the case progression or otherwise divulge confidential information to [Maire] as the case progressed."

The bulk of plaintiffs' argument on appeal is directed at trying to refute the trial court's determination that there was a substantial relationship between the Simpson firm's prior representation of Sale in the Stout matter and the representation of plaintiffs by Maire & Burgess in their dispute with Ben's over the development of Whispering Woods. To that end, plaintiffs argue at length that there are no factual or legal similarities between the two representations and thus disqualification was an abuse of discretion because "the two matters at issue . . . are entirely different." What plaintiffs fail to recognize, however, is that the substantial relationship test bears only on the trial court's determination that Maire *presumptively* received confidential information relating to Sale during the course of the Simpson firm's representation of Sale in the Stout matter. But whether that test was satisfied has no

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<sup>2</sup> The trial court may have also believed that when Gazzigli testified that he shared with the Simpson *firm* "extensive confidential information" about Sale during the course of the Stout matter, he shared this information not only with Simpson and Garbutt, but also with Maire. This would have been most consistent with Garbutt's testimony that Maire was personally in the loop on the case updates.

bearing on the trial court's independent finding that Maire *actually* received confidential information relating to Sale during the initial meeting at the outset of the Stout matter and during case progress updates from Garbutt (and likely from Gazzigli, too) throughout the time the Simpson firm represented Sale in the Stout matter. The trial court's finding of actual receipt of confidential information by Maire thus stands as an independent basis in support of the motion that operates separate and apart from the court's findings based on the substantial relationship test. Thus, much of plaintiffs' argument on appeal is beside the point.

To the extent plaintiffs indirectly challenge the finding of actual receipt of confidential information by pointing to evidence they offered in the trial court to show that Maire was not at the initial meeting with Sale, that evidence is immaterial for two reasons. First, as we have noted, our standard of appellate review requires us to "'discard evidence unfavorable to the prevailing party as not having sufficient verity to be accepted by the trier of fact.'" (*Kennedy v. Eldridge, supra*, 201 Cal.App.4th at p. 1203.) Second, even if Maire had not been at the initial meeting, there was still evidence from Garbutt and Gazzigli, which the trial court credited, that Maire received confidential information throughout the course of the Stout matter in the form of case progress updates. To the extent plaintiffs rely on Maire's denial that he received any such updates, that denial is immaterial because the trial court did not believe it.



*Confidentiality And Materiality*

Plaintiffs argue that even if Maire received "personal information pertaining to . . . Sale" during the Simpson firm's representation of Sale in the Stout matter, Ben's "did not address nor did the [trial c]ourt explain why th[at] . . . information . . . is confidential information of the corporation." Plaintiffs also complain that, even if the information was confidential, Ben's "never addressed how or why this information . . . was substantially related factually or legally to the current litigation."

This aspect of plaintiffs' argument ignores our standard of review. "In our review of disqualification motions, as elsewhere, the judgment of the lower court is presumed correct and all intendments and presumptions are indulged to support it on matters as to which the record is silent." (*H. F. Ahmanson & Co. v. Salomon Brothers, Inc.*, *supra*, 229 Cal.App.3d at p. 1451.) Where the judgment of the trial court is presumed correct, "'error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.'" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) That means it is not enough for plaintiffs to argue before this court about what Ben's did not address or what the trial court did not explain. Instead, it falls to plaintiffs to carry the affirmative burden of persuading us that the trial court erred. Thus, to prevail on appeal plaintiffs must persuade us that the information

disclosed to Maire in connection with the Simpson firm's representation of Sale was not confidential and/or was not material to Maire & Simpson's representation of plaintiffs in this action against Sale's corporation. Plaintiffs cannot prevail simply by arguing that Ben's failed to prove the information was confidential and material.

Plaintiffs take a weak stab at meeting their burden of persuasion by arguing that "details about business practices/operations are discoverable." In other words, they appear to contend that nothing Sale disclosed about his business practices and operations in connection with the prior representation can be considered confidential because they are entitled to conduct discovery on those subjects in this action, given that "[o]ne of the main issues in the subject litigation is whether [Ben's] was overbilling."

This argument is without merit. Just because now, 20 years later, plaintiffs may be entitled to conduct discovery in this proceeding about Sale's business practices and operations does not mean that the disclosures Sale made in confidence to his attorneys 20 years ago about those subjects are not to be treated as confidential. Indeed, plaintiffs cite no authority to support this ad hoc argument.<sup>3</sup> While details about Sale's

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<sup>3</sup> Moreover, plaintiffs fail to recognize that the information Maire learned from Sale in the Stout matter about Sale's business practices and operations could give Maire & Burgess a distinct advantage in crafting and directing the discovery into those subject matters in the present proceeding.

business practices and operations may be discoverable in this proceeding, that fact does not deprive Sale of the reasonable expectation that what he told his attorneys on those subjects back when the Simpson firm represented him will not be used against him now.

Plaintiffs contend "[t]he passage of time, over 20 years in the present case, affects the analysis of whether 'confidential' information is material in the subject litigation." Even if we accept this principle as true, however, it makes no difference because plaintiffs do not actually attempt to apply the principle to the facts at hand by showing the effect the passage of time had here on the materiality to the present litigation of the confidential information Sale disclosed to the members of the Simpson firm, including Maire, in the Stout matter. While the argument heading in their brief certainly indicates that plaintiffs intended to show how the passage of 20 years made the information "stale/irrelevant," the argument that follows is mostly taken up with describing the case on which they rely (*Hartford Casualty Ins. Co. v. American Dairy and Food Consulting Laboratories, Inc.* (E.D. Cal., Jun. 17, 2010, No. 1:09-cv-0914 OWW SKO) 2010 WL 2510999) and distinguishing a case Ben's cited in the trial court (*Brand v. 20th Century Ins. Co./21st Century Ins. Co.* (2004) 124 Cal.App.4th 594) for the proposition that the length of time between the prior representation and the present representation is irrelevant. When it comes to actual analysis, plaintiffs offer only this: "[I]n this matter, the information at issue was gained in a 1984

case and subsequent representation was not filed until 2010, which exceeds the duration discussed in Hartford by several years; it is a ridiculous proposition to assume that the passage of this amount of time is not relevant to the analysis of a conflict."

Again, however, we have assumed the passage of time *is* relevant to the determination of materiality. But to carry their burden of showing error on appeal, plaintiffs must do more than persuade us that the passage of time is relevant; they must persuade us that the passage of time here was so relevant that it was an abuse of discretion for the trial court to find that the confidential information disclosed during the Stout matter was material to the present litigation against Ben's regarding the development of Whispering Woods. Plaintiffs have not carried that burden. Simply asserting that "the passage of time has made any information obtained by the Simpson firm 'stale and irrelevant, and not material to the current representation'" does not make it so. *Why* is the information stale and irrelevant? Plaintiffs never say.

In addition to finding that Sale's business operations were at issue in both matters, the trial court expressly found that his "character, reputation, personal strengths and weaknesses, litigation attitudes, family history, educational background, health status, litigation history or experience, as well as the nature and outcome of his prior criminal cases are necessarily relevant to evaluation and litigation strategy in this litigation." To prevail on appeal, plaintiffs must explain why

these findings are incorrect and why the passage of 20 years necessarily rendered all of the confidential information disclosed on these subjects in connection with the Stout matter immaterial to plaintiffs' case against Sale's corporation. They have not done so. Accordingly, they have failed to show any abuse of discretion in the trial court's determination that the confidential information regarding Sale to which Maire was privy in the Stout matter was material to Maire & Burgess's representation of plaintiffs in the present case against Ben's.

C

#### *Final Arguments*

In something of an aside, plaintiffs complain that they "requested an in camera review of the various evidence and declarants to flush out the facts supportive of the request to disqualify," but the trial court "refused and instead focused on what appear to be bare bone allegations and conclusions in finding a conflict." This argument goes nowhere because, if nothing else, it is not supported by the record. The request for an in camera review to which plaintiffs refer was merely a request at oral argument on the disqualification motion that the court review the master calendars that allegedly showed Maire "was not part of th[e] initial meeting" with Sale.<sup>4</sup> It was *not* a

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<sup>4</sup> The master calendars were not part of plaintiffs' written opposition to the disqualification motion because Maire allegedly did not find the calendars until the Friday before the Monday hearing.

request for in camera review of "the various evidence and declarants," as plaintiffs now assert.

Finally, plaintiffs argue that the trial court's "only articulated reason [for concluding] that disqualification was appropriate" -- that is, the court's conclusion that Sale's business operations were common to both representations -- "fails because it directly opposes" the recent decision in *Banning Ranch Conservancy v. Superior Court* (2011) 193 Cal.App.4th 903. This argument is without merit for at least two reasons.

First, the trial court's conclusion that Sale's business operations were involved in both the prior representation and the present representation can hardly be characterized as "the only articulated reason" for the trial court's ruling that disqualification was appropriate. As the trial court's written ruling made clear, the court found disqualification was appropriate because Maire had actually and presumptively received confidential information on a wide range of subjects pertaining to Sale during the Simpson firm's representation of Sale in the Stout matter, and those subjects were "necessarily relevant to evaluation and litigation strategy in this [case]."

Second, even if the trial court's ruling had been based on Sale's business operations being the sole common denominator between the two representations, the decision in *Banning Ranch* would not undermine that ruling. In *Banning Ranch*, the City of Newport Beach moved to disqualify the law firm of Shute, Mihaly & Weinberger from prosecuting a case against the city under the

California Environmental Quality Act (CEQA) on behalf of a nonprofit public benefit corporation (Banning Ranch Conservancy) in part because the Shute firm had "previously represented the City on numerous legal matters, . . . none of [which] bore any substantial relation to the current litigation brought by the Conservancy against the City." (*Banning Ranch Conservancy v. Superior Court, supra*, 193 Cal.App.4th at pp. 909-910, 917.) In support of its argument for disqualification, "[t]he City cite[d] the Shute firm's 'national recognition as a leading environmental and land use firm . . . ,' and the 'special insight' the firm's attorneys have gained into the City's approach to land use matters through its prior representation of the City in past decades. According to the city manager, 'the City's approach to CEQA, the CEQA Guidelines and the California Coastal Act was created in part based upon the advice and counsel the City received from Shute Mihaly in the form of confidential documents protected by the attorney-client privilege.'" (*Id.* at p. 918.)

On writ review of an order disqualifying the Shute firm from representing the Conservancy, the appellate court rejected this argument, stating that "[m]erely knowing of a former client's general business practices or litigation philosophy is an insufficient basis for disqualification based upon prior representation." (*Banning Ranch Conservancy v. Superior Court, supra*, 193 Cal.App.4th at pp. 910, 918.) The court then noted an earlier appellate decision in which disqualification was found to be an abuse of discretion "[b]ecause the record did not

support a substantial relationship sufficient to give rise to an inference that the firm acquired material confidential information." (*Ibid.*) The court concluded by asserting that "[w]ithout evidence of a substantial relationship between the former and present representations, the City has failed to satisfy well-settled requirements." (*Ibid.*)

Based on its application of the substantial relationship test, it is clear that what the appellate court was doing in *Banning Ranch* was determining whether there was a basis to presume that the Shute firm, during its prior representation of the city, had acquired confidential information that was material to the present CEQA action the Conservancy had brought against the city. It is also clear that the court's determination was that the Shute firm had *not* presumptively acquired any such confidential information because the prior representation did not bear any substantial relationship to the current CEQA litigation. Thus, when the *Banning Ranch* court stated that "[m]erely knowing of a former client's general business practices or litigation philosophy is an insufficient basis for disqualification based upon prior representation," the information the court was discussing ("general business practices or litigation philosophy") was *not* information that was acquired in confidence in the course of the prior representation. Stated another way, *Banning Ranch* stands for the conclusion that a law firm cannot be disqualified based on successive representation where it did not acquire in the course of the prior representation any confidential information that is



material to the current representation, even though the law firm knows the former client's general business practices and/or litigation philosophy.

Thus understood, *Banning Ranch* is of no assistance here because the evidence, viewed in the light most favorable to the trial court's decision, established that Maire was not simply aware of Sale's general business practices and/or litigation philosophy as a result of the Simpson firm's former representation of Sale. Rather, the evidence established that because of that prior representation Maire was privy to confidential information about Sale in a number of areas that were relevant to the current litigation against Sale's closely held corporation. On this view of the evidence, which we are bound to accept, plaintiffs have failed to show any abuse of discretion by the trial court in its granting of the disqualification motion.

#### DISPOSITION

The order granting the disqualification motion is affirmed. Ben's shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

We concur:

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ROBIE, J.

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NICHOLSON, Acting P. J.

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HOCH, J.